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Nos. 88-1150, 88-1194, 88-1228

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

ICELEAN CLARK, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

JACKSON COUNTY, MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6816

DAVID S. TATEL
ALLEN R. SNYDER *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
HOGAN & HARTSON
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5741

* Counsel of Record

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the petitions in these cases are all jurisdictionally out of time.

2. Whether the lower courts, faced with admitted racial segregation by the State and the local school district, and faced further with the failure by the State and the school district to remedy the effects of that segregation, acted well within their discretion to approve the use of magnet schools and capital improvements to place the District's educational system where it would have been but for the prior unconstitutional segregation.

3. Whether the lower courts, faced with a school district that lacked sufficient funds to remedy its past racial segregation and that had exhausted all other possibilities for obtaining those funds, had no choice but to enjoin State laws that prevented the District from raising the necessary funds through a property tax levy.

4. Whether the lower courts acted well within their discretion in denying motions to intervene where the motions were not timely, where intervention would unduly delay the remedy for the unconstitutional segregation, where the would-be intervenors had not overcome the presumption that their interests were adequately represented by the State, and where they were in any event permitted to participate in the proceedings through amicus briefs and at oral argument.

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BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT

JURISDICTION

As shown in the Reasons for Denying the Writs, the Court does not have jurisdiction over the petitions[1] in

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[1] In this opposition, we cite the petition of the State of Missouri as "State Pet."; the petition of Jackson County as "Jackson Pet."; the petition of Icelean Clark as "Clark Pet."; the separate Appendix filed by the State as "App."; the Appendix attached to the State's petition as "Pet. App."; and the Appendix attached to this opposition as "Opp. App."

these cases because they were not filed within 90 days after entry of the Court of Appeals' judgment. 28 U.S.C. § 2101(c).

COUNTERSTATEMENT OF THE CASE

A. The Findings of Unconstitutional Segregation

This lawsuit was brought in 1977 by the Kansas City Missouri School District ("KCMSD") and a group of KCMSD school children, alleging that the State of Missouri had maintained unconstitutionally segregated schools in the District and had failed to eradicate the effects of that segregation. KCMSD was re-aligned as a party-defendant and beginning in October 1983 a 64-day trial commenced on both an interdistrict and intradistrict claim. On June 5, 1984, the district court (The Honorable Russell G. Clark) found that the alleged segregation had not caused any lingering interdistrict harm and so denied interdistrict relief. However, on September 17, 1984, Judge Clark found both the State and KCMSD liable for unconstitutionally segregating the schools of KCMSD and for failing in their affirmative duty to undo the harm of that segregation within KCMSD. App. 206a-13a, 235a-40a.

B. The Initial Remedial Order

After receiving proposed desegregation plans from the State and KCMSD and holding a two-week hearing on the appropriate methods for undoing the unconstitutional segregation, on June 15, 1985, Judge Clark made his key remedial determinations. First, he found that segregation had "caused a system wide *reduction* in student achievement in the schools of the KCMSD" (emphasis by the court), App. 155a, and noted that all parties (including the State) agreed that it was "appropriate to include a number of properly targeted educational programs in a desegregation plan." *Id.* (quoting State Plan at 5). He furthermore noted that both the State and KCMSD proposed programs "designed to increase student achievement" and that both specifically endorsed

programs that would achieve AAA status (as defined by the State Board of Education) for the KCMSD schools. App. 156a, 158a.

Next, Judge Clark addressed and approved the key components of the desegregation plan: magnet schools, capital improvements, and encouraging voluntary transfers of students to desegregate KCMSD schools. He noted that "accomplish[ing] desegregation" within a school district that had become nearly 70% black (after being only 22.5% black twenty-five years ago (App. 217a)) is a "difficult task" that could not be achieved without attracting non-minority students into the District, and that it could best be accomplished through magnet schools, achievement of AAA status, and improvement of the quality of KCMSD education. App. 185a. He specifically found that magnet schools "can be utilized to assist the State of Missouri and the KCMSD in expanding desegregative educational experiences" and in drawing non-minority enrollments, App. 176a, 177a, and he ordered the State to seek participation from surrounding school districts in a voluntary interdistrict transfer of students. App. 185a-86a.

Finally, Judge Clark found that the current state of the 68 KCMSD school facilities was so poor that it presented health and safety hazards, undermined the educational achievement components of the desegregation plan, perpetuated the inferior education that segregation had fostered, and discouraged the voluntary transfer of non-minority students. App. 187a-89a. He rejected the State's contention that the deteriorated condition of the schools had not been caused by segregation and, accordingly, ordered a capital-improvement program designed to correct those conditions. App. 189a-90a.

C. The Initial Appeal

On appeal to the Eighth Circuit, the State did not dispute Judge Clark's determination that the State and KCMSD had failed to remedy the effects of their unconstitutional segregation; neither did it appeal "sub-

stantial portion[s]" of the remedial order, including the implementation of programs designed "to achieve the AAA rating" in KCMSD. *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 108 S. Ct. 70 (1987) ("*Jenkins I*"). Rather, the State challenged the court's authority to implement either a voluntary interdistrict transfer program or a capital-improvements program.

In response, the Court of Appeals rejected the State's contention that a voluntary interdistrict transfer program could not be implemented unless an interdistrict violation had been found.[2] The court also rejected the State's contention that the deterioration in the school buildings was in no part due to the prior segregation and that, therefore, no capital-improvements program could be required. *Id.* at 685. Instead, the *en banc* court concluded that the contrary "findings of the district court are sufficient to support its conclusion that capital improvements are necessary for successful desegregation." *Id.* at 685.

D. The Current Remedial Orders

The remedial orders now before this Court implemented the previously approved desegregation plan by: (1) determining the particular capital improvements and magnet schools still necessary to desegregate KCMSD; (2) allocating funding responsibility between KCMSD and the State; and (3) ensuring that KCMSD could pay its share of the necessary desegregation expenses. To determine the particular capital improvements and magnet schools needed, Judge Clark first found that "KCMSD

[2] Relying on precedents from this Court, other courts, and on its own holding and experience with the St. Louis desegregation plan, *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 459 U.S. 877 (1982), the court determined that "a voluntary interdistrict program is one that has great potential for improving the racial balance in the Kansas City area" and that "[t]he experience in St. Louis with such a plan seems to have been favorable." 807 F.2d at 683 n.30.

facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments." App. 68a. Indeed, he found that KCMSD's "physical facilities have literally rotted" and that the "overall condition" of the schools remained "generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD." App. 68a, 71a-72a, 86a. To cure these conditions, Judge Clark approved only those specific programs and costs he found necessary to "eliminat[e] the substandard conditions present in KCMSD schools" and thereby "provid[e] the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied." App. 69a, 72a-79a.

To ensure that KCMSD could produce its share of the necessary desegregation costs,[3] Judge Clark first calculated the amount by which KCMSD's available revenue would fall short of its share. He next found that KCMSD had already exhausted *all* its available means of producing the necessary revenues, including its proposal of numerous bond issues and property tax increases, all of which had failed to pass.[4] In these circumstances, Judge

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[3] Judge Clark held the State and KCMSD ("the two constitutional violators") jointly and severally liable for the desegregation costs, but generally required the State to pay 75% of those costs and KCMSD 25%. (With regard to capital improvements, however, he made them equally liable for costs.) App. 79a, 81a-82a. He rejected the State's proposal for a 50%/50% allocation because: (1) the State was at greater fault for having mandated the unconstitutional segregation; (2) KCMSD's population is only 9% of the State's total and should not bear 50% of the costs; and (3) "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan." App. 111a-13a.

[4] Indeed, he noted that "KCMSD has not had a bond passage or a levy increase since 1969." App. 86a. He furthermore noted that the court itself had encouraged the Missouri General Assembly to enact legislation giving a district such as KCMSD additional means to meet its desegregation obligation, but that no legislation had

Clark concluded that he had no choice but to require local authorities to impose certain taxing measures to meet their constitutional obligation—even though the measures were in excess of the strict limits set by State law. Specifically, he authorized local officials to: (1) increase the District's property tax levy by $1.95, an amount necessary to fund KCMSD's share of desegregation costs through the 1991-92 school year (other than for capital improvements); (2) issue bonds in the amount of $150,000,000 to meet the capital-improvement requirements; and (3) apply a 1.5% income-tax surcharge to income generated in KCMSD (in order to retire the bonds). App. 88a-89a.[5]

E. The Eighth Circuit's Affirmance of the Current Remedial Orders

On appeal, the Eighth Circuit affirmed the capital-improvement and magnet-school orders, affirmed the cost allocation between the State and KCMSD, modified the procedures permitting local authorities to increase KCMSD's property tax, and reversed the income tax surcharge.

More specifically, the court approved the district court's findings that the deterioration both of educational quality and the physical facilities in KCMSD, as well as the racial imbalance in many of its schools, were all vestiges of the unconstitutional segregation. App. 11a-21a. It furthermore affirmed the district court's determination that the particular capital improvements and magnet schools at issue were reasonable and necessary steps toward the "long term goal" of restoring "*the victims of*

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been forthcoming; and that the State and KCMSD had been unable to agree on any alternative method for raising KCMSD's share of the desegregation costs. App. 84a-86a.

[5] In a subsequent order, Judge Clark provided that the property tax increase should be used to retire the bonds, and the surcharge to fund desegregation costs other than capital improvements. App. 63a-64a.

unconstitutional segregation . . . to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment." App. 10a (quoting district court at App. 146a) (emphasis added by Court of Appeals).[6]

The Eighth Circuit affirmed Judge Clark's authorization of an increased property tax levy on two alternative grounds. First, the court determined on the basis of this Court's decision in *Griffin v. County School Bd.*, 377 U.S. 218 (1964), as well as its own *en banc* decisions in *Liddell* and *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975), that when all other alternatives had been exhausted the court could order local authorities to exercise their taxing power where absolutely necessary to remedy a constitutional violation. App. 28a-29a. Second, however, the Eighth Circuit determined that State laws had effectively prohibited KCMSD from imposing a property tax sufficient to meet its desegregation obligations and that Judge Clark's order should therefore be modified simply to enjoin those State laws. Specifically, as the court explained, in 1969 a majority of KCMSD voters approved an increase of the tax levy to $4.30, but Missouri law forbade the increase without a two-thirds majority, which had not been received. Thereafter, the voters by 63 percent approved an increase to $3.75, which passed because a two-thirds vote was not required. Subsequently, however, the levy was cut nearly in half to $2.05, not by KCMSD voters, but by operation of certain State-law tax changes and rollbacks. App. 32a-33a.

Accordingly, the Eighth Circuit reasoned, State law had "so narrowly circumscribe[d] KCMSD's ability to

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[6] Moreover, the court rejected the State's contention—the same one it had previously rejected in *Jenkins I* and *Liddell*—that efforts to induce voluntary interdistrict transfers may not be used to correct a racial imbalance caused by unconstitutional segregation. App. 11a. *See Jenkins I*, 807 F.2d at 683-84; *Liddell*, 731 F.2d at 1303.

raise money that, if forced to operate within these limits, the district court would lack power to implement a remedy." App. 34a. The court therefore directed KCMSD's elected Board to submit to county taxing officials the amount of the tax levy needed to meet its desegregation obligation (subject to a maximum figure to be set by Judge Clark), and authorized Judge Clark to enjoin those State-law provisions which prevented imposition of that levy. By thus affirming the order as one which simply "set aside levy limitations" on KCMSD's taxing authority, the Eighth Circuit relieved Judge Clark from the need either to determine the particular property tax that should be imposed or to order imposition of that tax. App. 39a-40a.

Finally, the Eighth Circuit reversed Judge Clark's income-tax surcharge order because it could not be construed as simply removing State-law limitations on local taxing authority. Rather, obtaining KCMSD revenue from that source required a "restructur[ing] [of] the State's scheme" and "an entirely new form of taxing authority." In imposing such a scheme, the court held, "the district court has exceeded its authority." App. 40a.

REASONS FOR DENYING THE WRITS

The Court should deny the petitions in these cases for three reasons. First, the petitions are jurisdictionally out of time and should be denied for that reason alone.

Second, the questions petitioners seek to have reviewed are either not raised by the cases at all or concern well-settled issues not meriting reconsideration. Thus, the State contends that this case calls into question the proper goals of a desegregation remedy when, in fact, the ultimate goal of every remedial order in this case was the goal repeatedly approved by this Court—removal of all vestiges of unconstitutional segregation in the school district. Moreover, the lower courts employed well-established desegregation tools in achieving that goal and acted well within their discretion in implementing those tools.

Likewise not presented by this case is the question of a federal court exercising taxing power. Rather, under the Court of Appeals' construction of the applicable State law and that court's modification of the district court's order, the lower courts have simply enjoined State law which prevents local officials from meeting their constitutional obligations. Moreover, even if the case were viewed as a judicial direction to the local authorities to exercise their taxing authority, it is well-settled that when no other alternative is available to remedy a constitutional violation, such a direction is authorized.[7]

Finally, the legal principles governing the KCMSD desegregation process—including every issue the State now seeks to have reviewed—have been addressed and finally resolved against the State in earlier Missouri desegregation cases or in earlier stages of this very case. Furthermore, as to each of the decided legal principles, certiorari was either sought and denied or was not sought at all. Now, when the desegregation remedy is in the third year of a five-year plan implementing ongoing capital-improvement and magnet-school programs in reliance on the settled legal principles, those principles should not be reconsidered. The desegregation process should, at long last, be permitted to proceed and cure the effects of unconstitutional segregation in KCMSD's schools.

I. This Court Lacks Jurisdiction to Entertain the Petitions

A party asking the Court to assume jurisdiction has the burden to establish that jurisdiction exists.[8] The present petitioners have not met that burden with regard to the timeliness of their petitions. Indeed, the record raises such serious doubts concerning timeliness that the petitions should be denied for that reason alone.

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[7] Also well-settled are the principles governing the denial of intervention to Jackson County and Clark. That denial was well within the lower courts' discretion, was in any case harmless, and in all events raises no question meriting review on certiorari.

[8] *E.g., Dep't of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965) ("the party seeking review here must show that we have jurisdiction of the case" (footnote omitted)).

Congress has provided that "any writ of certiorari intended to bring any judgment . . . in a civil action . . . before the Supreme Court for review *shall* be taken or applied for within ninety days after the entry of such judgment . . . ." 28 U.S.C. § 2101(c) (emphasis supplied). Although the Court of Appeals' judgment in this case was entered on August 19, 1988, the first effort any party made to seek review of that judgment was on December 31 when petitioner Jackson County submitted an application for extension of time in which to file its petition. That application was returned by the Court because, as the Clerk noted in his January 3 letter to Jackson County, the 90-day statutory period in this case began to run on August 19 and had already expired. (The Clerk's letter is reprinted in the Appendix to this brief, Opp. App. 1a-2a.)

Although a timely petition for rehearing in the Eighth Circuit might have suspended the running of the 90-day period, no such petition was filed in this case.[9] Indeed, on October 14 the Court of Appeals entered an order expressly stating that *only* rehearing *en banc* petitions had been filed:[10] "There are three petitions for rehearing *en banc* pending before the Court. It is hereby ordered that all petitions for rehearing *en banc* are denied." App. 53a. In these circumstances, the Clerk of this Court was clearly correct in his January 3 deter-

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[9] As the Clerk of this Court stated in his January 3 letter: "Rule 35(c) of the Federal Rules of Appellate Procedure clearly states that the pendency of a petition for rehearing en banc shall not affect the finality of the judgment of the Court of Appeals." Opp. App. 1a. Therefore, as the Clerk also stated, "a petition for rehearing en banc does not toll the time for filing a petition for a writ of certiorari, only a petition for rehearing would toll the time. See Rule 40 of the Federal Rules of Appellate Procedure and Rule 20.4 of the Rules of the Supreme Court." *Id.*

[10] Copies of the petitions for rehearing *en banc* have been lodged with this Court by respondent Kalima Jenkins, *et al.*

mination that the time to petition this Court to review the August 19 judgment had long since expired.[11]

Nevertheless, petitioners seek to avoid the 90-day rule by relying on a January 10, 1989 order which the Eighth Circuit issued *after* the Clerk of this Court had determined that no petition could properly be filed. That January 10 order stated in full:

> This Court's mandate which was issued on October 14, 1988, is hereby recalled.
>
> There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. *It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied.*
>
> This order is entered *nunc pro tunc effective October 14, 1988.* The Court's mandate shall now issue forthwith. [Pet. App. A.1. (emphasis supplied).]

There is nothing in the record showing any submission by any party with regard to the January 10 Order, which

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[11] We are advised that, pursuant to Supreme Court Rule 20.3, the Clerk's office routinely returns petitions that incorrectly attempt to count the 90-day petitioning period from the date of a denial of a petition for rehearing *en banc.* Moreover, our research discloses that this Court often—*and without exception*—denies motions directing the Clerk to file petitions in such circumstances. *See, e.g., Poe v. United States* (motion denied May 16, 1988); *Farnum v. Comm'r of Patents and Trademarks* (motion denied Oct. 5, 1988). The reason for this well-settled practice is that the 90-day statutory requirement is *jurisdictional* and cannot be waived even by the Court itself. *E.g., Fed. Trade Comm'n v. Minneapolis-Honeywell Co.,* 344 U.S. 206, 207 (1952) ("The initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period allowed by law," citing 28 U.S.C. § 2101(c)); *Dep't of Banking v. Pink,* 317 U.S. 264, 268 (1942) (petition for certiorari not filed within time provided by statute "must . . . be denied for want of jurisdiction"). Indeed, precisely because the rule is jurisdictional the Court has "strictly applied" it and has *never* granted a motion to file a petition sought to be filed in violation of the rule. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 396 (6th ed. 1986).

appears to have been issued in an attempt to confer jurisdiction on this Court over the present petitions. It is submitted that the Court of Appeals' January 10 Order was ineffective to do so.

This Court long ago determined that its jurisdiction cannot be conferred by the device of *nunc pro tunc* orders declaring, *ipse dixit*, that the jurisdictional requirements have been met—when in fact they have not been met. *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U.S. 258, 261 (1888). As the Court there stated: "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Id.*[12] This fundamental principle controls the present cases. Once the time for petitioning this Court had expired—which it did 90 days after the August 19 judgment—no "simple order" of the Eighth Circuit could *nunc pro tunc* revive this Court's jurisdiction.[13] If it could, "the law which

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[12] *Accord, Wayne Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137-38 (1937) (court of appeals may not entertain petition for rehearing merely for purpose of extending time for appeal to Supreme Court); *Conboy v. First Nat'l Bank*, 203 U.S. 141, 145 (1906) (once time to petition Supreme Court has expired, petition for rehearing in court of appeals cannot serve to "reinvest" this Court with jurisdiction).

[13] We do not mean to say that if a petition for rehearing had *in fact* been timely filed, the Eighth Circuit could not have recognized in an order denying rehearing that the time for petitioning this Court had thereby been tolled (*see* Supreme Court Rule 20.4). But that is not this case, and the Eighth Circuit's order did not state that it is. Rather, the Eighth Circuit has purported *nunc pro tunc* to deny petitions for rehearing that were *not* in fact filed. This the Eighth Circuit cannot do.

Neither is there any basis whatever for these petitioners to contend that their petitions were intended to be rehearing petitions. First, those petitions are all both in form and substance only *en banc* petitions. Second, both the Federal Rules of Appellate Procedure (Rules 35 and 40) and the Eighth Circuit's own local rules (Rules 15 and 16) clearly differentiate between the two different

limits the time within which an appeal can be taken would be a dead letter." *Id.*

II. These Cases are Controlled by Well-Settled Legal Principles that were Carefully Followed by the Lower Courts and that Do Not Merit this Court's Reconsideration

A. The Lower Courts' Orders were Plainly Designed to Meet the Central Remedial Goal Repeatedly Approved by this Court—Removal of the Vestiges of Unconstitutional Segregation

According to the State, the remedial orders in these cases "all raise a central question: What are the proper goals of a desegregation remedy?" State Pet. 14. The State contends that the goals were: (1) making the educational facilities in KCMSD comparable to those in adjacent suburban districts; and (2) attracting non-

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kinds of petitions. Third, the Clerk of the Eighth Circuit expressly brought those rules to the parties' attention in that court's August 19 letter announcing entry of the judgment. Opp. App. 3a. Finally, it is quite apparent that the parties to these proceedings know how to file a petition for rehearing when that is their intention. In the course of contesting desegregation orders in the Kansas City and St. Louis cases, the State of Missouri has variously filed petitions for rehearing, petitions for rehearing *en banc*, and petitions for both rehearing *and* rehearing *en banc*. By way of illustration, on February 10, 1988, the State filed with the Court of Appeals a "Motion For Rehearing En Banc" based upon, *inter alia*, the argument (p. 1) that "consideration by the full court is appropriate because of the exceptional importance of the questions involved." *Jenkins v. Missouri*, No. 87-2076WM. On December 6, 1985, the State filed with that court a "Petition For Rehearing," stating (p. 1) that the Eighth Circuit's decision reflected "either an oversight or misunderstanding of significant issues." *Liddell v. Missouri*, No. 85-1420EM. And on August 6, 1985, the State filed with the court a "Conditional Request . . . for Reconsideration or for Rehearing En Banc" contending that (p. 2) "if reconsideration or rehearing of any portion of the decision is deemed to be appropriate, consideration by the full court of the matters raised in this request is necessary to secure and maintain uniformity of decisions in this Court." *Liddell v. Missouri*, Nos. 85-1179-EM and 85-1220-EM.

minority students from the suburban districts to KCMSD. *Id.* at 14-15, 19. The State thereby implies that the present remedial orders were *not* designed to cure unconstitutional segregation, but to upgrade and achieve a better racial balance in KCMSD schools. The State therefore requests the Court to grant certiorari to decide whether such goals are legitimate.

The complete answer to this request is that the ultimate goals of the present desegregation remedy were *not* those described by the State at all. Rather, from the earliest district court order cited by the State (June 5, 1984) to the final judgment of the Eighth Circuit now at issue (August 19, 1988), both lower courts repeatedly and without exception acted with a single, overriding purpose: to cure the effects of the unconstitutional segregation in KCMSD. And both those courts served that purpose by closely adhering to the principles established by this Court.

Thus, in his June 5, 1984 Order, Judge Clark stated (at 97) that he was "compelled to follow the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation." In correcting the violation, he noted (in his Sept. 17, 1984 Order) that he had not only "the power but the duty to enter a decree which will correct the continuing effects of past discrimination as well as bar discrimination against blacks in the future." [14] At the same time, he recognized that "'[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.'" [15] Rather, he stated, "the goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation." App. 153a.

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[14] App. 240a (citing *Louisiana v. United States*, 380 U.S. 145 (1965)).

[15] App. 182a (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971)).

The most important vestiges Judge Clark found were "a system wide *reduction* in student achievement in the schools of the KCMSD";[16] "low achievement" and a "general attitude of inferiority among blacks";[17] racial isolation in the schools;[18] and severe deterioration in the physical conditions of the schools, which led to student withdrawals from the schools, which led in turn to further deterioration.[19] As discussed earlier, to cure these

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[16] App. 155a (emphasis in original).

[17] App. 211a. Judge Clark found that "[s]everal witnesses confirmed the conclusion" reached by this Court in *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), *i.e.*, that segregation had "ruin[ed] attitudes" of students in KCMSD. *Id.* He furthermore found that KCMSD's history of segregation had "bogged down" the "education process" and "[t]oo often, as a result, a higher percentage of black students are among the lower achievers." App. 164a.

[18] Specifically, he found that "as of 1974, 20 years after *Brown I*, 39 schools were more than 90+% black" and that "[e]ighty percent of all blacks in the District attended schools that were 90% black." App. 212a. He further found that while some improvement had occurred by 1983-84, there were still "24 schools . . . racially isolated with 90+% black enrollment" and that the dual school system had not yet been dismantled. App. 213a. He furthermore found that between the years immediately after *Brown* and the present, the black school population had shifted from just over 20% to just under 70%, App. 217a, that the total enrollment of white students had fallen by 80%, *id.*, and that the segregated system had caused the departure of whites to private schools and the suburbs. August 25, 1986 Order, Opp. App. 8a.

[19] Judge Clark found that the deterioration flowed directly from the State's failure to remedy its previous unconstitutional segregation: "the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." App. 69a. Significantly, in affirming the latter findings, the Eighth Circuit expressly noted that the State's failure to remedy its unconstitutional conduct had produced a downhill slide in the quality of education: "The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support

related, continuing vestiges of State-imposed segregation, Judge Clark approved a desegregation remedy with two primary components: a capital-improvement plan and a magnet-school plan. Contrary to the State's petition, however, neither component was intended as an end in itself; rather, both were found by Judge Clark—and the Eighth Circuit—to be *necessary* to cure the inferior education and racial isolation that remained as vestiges of the unconstitutional segregation. They were designed to do this in two complementary ways: restoring the educational quality of the schools to the level where they would have been but for the segregation and, through both that general higher quality and the specific magnet program, attracting voluntary transfers to KCMSD schools by non-minority students which would decrease the racial isolation produced by the segregation.[20]

As a touchstone for measuring the educational level to which the KCMSD schools had to be restored, Judge Clark relied in part on the quality necessary for the schools to achieve the AAA status already gained in all the surrounding districts.[21] He concluded that achieving that classification was the appropriate "first step in

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from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." App. 17a-18a (footnotes omitted).

[20] Thus, as Judge Clark found in ordering implementation of the two programs, "the capital facilities program requested by the KCMSD is a proper remedy through which to remove the vestiges of racial segregation, and is needed to attract non-minority students back to the KCMSD." App. 124a. Similarly, Judge Clark determined that the magnet-school plan should be adopted "as part of the Court's overall plan to eliminate the vestiges of unlawful segregation in the KCMSD . . . ." App. 121a.

[21] This was because, as he found, while KCMSD was rated only AA, *all* other school districts in the Kansas City area are rated AAA. App. 159a. Further, he found that both "patrons" and "potential students" of KCMSD "view a AAA rating as an important factor in measuring the school's ability to educate its students." App. 162a. In addition, he noted that both KCMSD and the State "endorse[d] achieving AAA status." App. 158a.

KCMSD's journey to regain and maintain a quality education program and could serve to assist in attracting and maintaining non-minority student enrollment." App. 162a.

Based on the foregoing, as the State quotes in its petition (at 14-15), Judge Clark reasoned that: "[t]he long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities equal to or greater than those presently in the average Kansas City, Missouri metropolitan suburban school district." App. 145a-46a. But, as Judge Clark made unmistakable in the very next sentence of his order (which the State *omits* from its petition), bringing KCMSD to a level roughly comparable to the surrounding districts was *not* an end in itself; it was a *means* of curing the State's unconstitutional conduct:

> In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment. [App. 146a.]

As the Eighth Circuit held in rejecting the State's argument below:

> Careful reading of the district court's order shows that the court did not view improving education for all KCMSD students as an end in itself, but *as a means to serve the goals of restoring to the victims the education they have been denied* and of attracting and maintaining whites in the KCMSD. We cannot say that the district court abused its discretion in using system-wide educational enhancements to *accomplish its legitimate desegregative objectives.* [App. 13a-14a (emphasis supplied).]

Once it is made apparent that the issue raised by the State is a false one, it also becomes apparent that what the State truly attacks is not the adoption of impermissible goals, but the factual findings and exercise of equitable discretion that resulted from the the lower courts' pursuit of permissible goals. But nothing in those find-

ings or that exercise presents an important issue meriting this Court's review. Rather, as the previous discussion has shown, the two essential issues confronted by the lower courts in the present orders were: (1) what are the lingering effects of segregation in KCMSD? and (2) how can those effects best be remedied? As to the first question, Judge Clark found, and the Eighth Circuit agreed, that segregation in KCMSD has produced inferior education, deteriorating physical facilities, and racial isolation that still remain in the District. While it is clear from its petition that the State does not agree with all the lower courts' findings, it cannot show—indeed, it has not even argued—why this Court should abandon its rule against disturbing such findings.[22]

Likewise, regarding the second issue—how best to remedy the identified vestiges of segregation—the district court found, and the Court of Appeals agreed, that certain kinds of educational improvements were both reasonable and necessary to achieve that end. Again, the State does not contend that this Court should disturb these findings. Neither has it shown that the district court abused its broad discretion to remedy the effects of segregation.[23] Indeed, the two primary tools employed by the lower courts—capital improvements and magnet

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[22] This Court has repeatedly held that it will not disturb findings of fact concurred in by both a district court and court of appeals. *See, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 n.5 (1985); *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 n.15 (1984); *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

[23] This Court has repeatedly stressed not only the breadth of the federal courts' equitable powers to remedy past discrimination, *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), but also the considerable deference owed to the lower courts' exercise of those powers because they have "first-hand experience with the parties and [are] best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987), (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 6).

schools—are both well-established means for undoing the harm of segregation.[24]

The truth of the matter is that the remedial orders now before this Court are concerned almost exclusively with the complex details of how many and which kinds of magnet schools and capital improvements are necessary to restore KCMSD to where it would have been but for the years of unconstitutional segregation. The working out of those details is committed to the fact-finding authority and sound discretion of the lower courts. Nothing in them presents an important issue of law for this Court's consideration.

B. It is Well-Settled that the Lower Courts could Enjoin State-Law Limitations on Local Officials' Taxing Authority, or Require Local Officials to Exercise their Taxing Authority, where such Action was Necessary to Remedy a Constitutional Violation

Both lower courts found that KCMSD had insufficient revenues to fund its constitutional obligation, that all available means to obtain the needed revenues had been exhausted, and that local officials could therefore be required to exercise their property-tax authority to produce the necessary funds.[25] Nevertheless, no such requirement was imposed in this case; rather, the Eighth Circuit determined that an order enjoining the pertinent Missouri State laws would permit local authorities to select and impose a property tax sufficient to meet their constitutional obligations. As the Eighth Circuit held, "the basic effect of the district court's order was to set aside levy limitations on [KCMSD's] taxing authority."

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[24] The Opposition of Respondent Kalima Jenkins, *et al.*, catalogues the repeated use and approval of such tools by this Court, the lower courts, and the Congress.

[25] Judge Clark also directed local officials to exercise their bond-issuing authority in order to finance the necessary capital improvements. No challenge to that direction was raised either in the Eighth Circuit or in the petitions before this Court.

App. 39a-40a.[26] Contrary to the State's claim, therefore, no question of a judicially-imposed tax is presented. Instead, the lower courts have merely exercised a fundamental power of the federal judiciary—enjoining State laws which thwart vindication of constitutional rights.

Moreover, even if the question raised by the State were fairly presented, this Court's cases long ago resolved that question. Indeed, the Court has repeatedly determined that where no other recourse is available to remedy a governmental entity's constitutional violation, the federal courts may require the entity to exercise its taxing power, and may further require that State-imposed limitations on that power give way. Thus, in *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978), the Court recognized a long line of cases in which it had "vigorously enforced the Contract Clause against municipalities—an enforcement effort which included . . . ordering that taxes be levied and collected to discharge federal-court judgments *once a constitutional infraction was found.*" *Id.* at 681 (emphasis supplied). *Accord, Owen v. Independence*, 445 U.S. 622, 639 n.19 (1980).

Similarly—and closer to the factual circumstances of this case—in *Griffin v. County School Board, supra*, this Court addressed the federal courts' power to require local authorities to impose tax levies where necessary to implement a desegregation decree. There, the Court unanimously declared that it had "no doubt of the power of the [lower] court" both to enjoin the issuance of tax credits to private, segregated schools and "if necessary to prevent further racial discrimination, require the supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination [the] public school

[26] Significantly, petitioners do not challenge the Eighth Circuit's critical construction of the pertinent Missouri law. Moreover, just last term this Court reaffirmed that it "normally defer[s] to Courts of Appeals in their interpretation of state laws . . . ." *Maynard v. Cartwright*, 108 S. Ct. 1853, 1857 (1988).

systems . . . ." 377 U.S. at 232-33. Furthermore, just as this Court in its Contract Clause cases held that State laws which unconstitutionally impair the municipality's ability to meet its debt obligations must give way, so too in its desegregation cases the Court has repeatedly declared that State laws interfering with a municipality's obligation to remedy its unconstitutional segregation must likewise give way.[27]

In an effort to distinguish this well-settled doctrine, the State advances several wholly erroneous contentions. First, it contends that the Court's Contract Clause cases hold that a judicial order requiring a tax levy is valid *only* "when [the legislative] department has directed or authorized such tax to be imposed. If no tax has been provided for . . . granting the [order] would be an assumption of legislative power . . . ." State Pet. 24 n.31 (quoting *United States v. New Orleans*, 98 U.S. 381, 391 (1878)). But this quote is not from the Court's decision at all, but rather from the *losing argument* of the City of New Orleans in the cited case. In *rejecting* that argument, Justice Field held for a unanimous Court that while "the power of taxation belongs exclusively to the legisla-

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[27] *See, e.g., North Carolina State Bd. of Educ. v. Swann*, 402 U.S. at 45 ("if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct . . . the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees"). Moreover, as the Eighth Circuit recognized, this Court's later citations to *Griffin* and *North Carolina State Bd. of Educ.*—even in nondesegregation contexts—leave no doubt of the broad principle for which they stand. Thus, as the Eighth Circuit quoted from *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979):

> State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause . . . . [The state] parties . . . may be ordered to . . . implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. *E.g., North Carolina Board of Education v. Swann*, 402 U.S. 43; *Griffin v. County School Board*, 377 U.S. 218. [App. 35a (quoting 443 U.S. at 695) (other citations omitted).]

tive branch of the government," a governmental unit that has been delegated taxing power may be judicially ordered "to exercise the power" when it has a legal "duty" to do so. 98 U.S. at 392, 397. Furthermore, in a subsequent case, and again writing for a unanimous Court, Justice Field explained why a judicial order requiring a tax levy may be necessary even when State law would prohibit the levy:

> It is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including among others, that of taxation, *subject, however, to this qualification,* which attends all State legislation, *that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States* . . . . Legislation producing this latter result . . . must be disregarded . . . . [*Wolff v. New Orleans*, 103 U.S. 358, 365 (1880) (emphasis supplied).]

The State simply misunderstands these cases when it contends, with inappropriate hyperbole, that "it would be an astonishing proposition to maintain that Article III required the States to share with the *federal judiciary* their sovereign powers over taxation." State Pet. 25. No one in this case—or in this Court's Contract Clause or desegregation cases—ever contended that a federal court has taxing power. What it does have is the power to require a State or municipality to exercise *its* taxing power where the Constitution commands that exercise, or to set aside State law that precludes its necessary constitutional exercise.[28] As the Court said in *Griffin*, "the District

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[28] For its contrary view, the State relies heavily on this Court's decision in *Rees v. Watertown*, 86 U.S. 107, 116-17 (1873). State Pet. 23. But that case is completely inapposite. *Rees* concerned nothing more than a city's failure to pay a debt. This Court held that while a judicial order requiring the city to pay *was* appropriate, it was not appropriate for the federal court to levy a tax for the purpose of paying the debt *where a state statute in existence at the time the debt was incurred expressly prohibited such a tax.* 86 U.S.

Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is their to levy taxes . . . ." 377 U.S. at 233.[29] That is precisely what Judge Clark ordered in this case. And, as modified by the Eighth Circuit, his order does no more than enjoin State laws which prohibit local, elected authorities from imposing a tax *they* find necessary to meet their constitutional duty. This Court's cases long ago settled the judicial authority for such an order, and nothing in the present petitions justifies reconsideration of those cases.[30]

120-21. Accordingly, quite unlike *Griffin*, the Contract Clause cases, and the present case, there was in *Rees* no *constitutional* violation justifying the overriding of state laws and the court therefore had no authority to devise a tax expressly prohibited by those laws.

[29] The State acknowledges that "[t]here is no question that this Court in *Griffin* seemed to approve of judicially-compelled taxes," but it contends that "the Court cited no support for this controversial proposition" and that it was not "so compelling as to be the last word on the issue." This is particularly so, the State says, because the Court "has never said, before or after" that a federal court is ever empowered to order a tax levy. State Pet. 24. All of this is not only presumptuous; it is also flatly wrong.

When *Griffin* explicitly recognized the power of a federal court to order a tax levy when necessary to remedy an Equal Protection violation, it did precisely what the Court had repeatedly done in its long line of Contract Clause cases: acknowledge that the power to tax is a legislative power, but declare that the exercise of that power may be judicially ordered when the Constitution commands it. Moreover, the *Griffin* Court made clear that the ordering of a tax levy stands on the same footing and is justified "[f]or the same reasons" as is any other component of a desegregation decree—it is appropriate if necessary to remove racial discrimination from a public-school system. 377 U.S. at 233. Thus, contrary to the State's contention, *Griffin* was certainly not an idle, unprecedented pronouncement. Rather, it was representative of and consistent with settled doctrine. Furthermore, and again contrary to the State's view, subsequent to *Griffin* the Court has repeatedly reaffirmed the efficacy of the case and the principles for which it stands. *See Monell, Owen,* and *Washington State Commercial Passenger Fishing Vessel, supra.*

[30] The State argues, however, that even if it were settled that in some cases an order requiring or permitting a tax levy is justified,

C. The Lower Courts Acted Well Within Their Discretion to Deny Intervention to Petitioners Clark and Jackson County, and that Denial Clearly Raises No Issue Meriting this Court's Review

While petitioners Clark and Jackson County attempt to argue the merits of the desegregation action in their petitions to this Court, they are clearly not entitled to do so because they were not parties in either the district court or the Court of Appeals.[31] Moreover, even if they were entitled to address the merits, the questions they raise are in substance the same ones raised by the State and are unworthy of this Court's review for the reasons presented in this opposition.[32]

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the Court should grant certiorari to determine the appropriateness of the levy in the circumstances of this case. But the State's *only* argument that a tax was not justified here is its wholly fallacious contention that the lower courts "made no effort to avoid interference with local taxing authority." State Pet. 27. By this the State means that to "avoid interference" the lower courts should have cut programs from the desegregation plan so that a tax would not be required. State Pet. 27. In other words, the State's view is that the constitutional remedy should have been reduced to match KCMSD's available funds. This upside-down view of the federal courts' role in protecting constitutional rights is not worthy of this Court's consideration.

[31] *See United Auto. Workers v. Scofield*, 382 U.S. 205 (1965); *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917). Only if this Court first granted certiorari on the question of the denial of intervention itself, and reversed that denial, could Clark and Jackson County acquire standing to challenge the judgment of the Court of Appeals. *See In re Leaf Tobacco Bd.*, 222 U.S. 578, 581 (1911); *Ex Parte Cutting*, 94 U.S. 14, 20-22 (1876); *see also Pennsylvania v. Rizzo*, 530 F.2d 501, 508 (3d Cir. 1976) ("one properly denied the status of intervenor cannot appeal the merits of the case") (citing *Hoots v. Pennsylvania*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974)).

[32] The only issue raised by Jackson County or the Clark group that is not also raised by the State concerns the alleged applicability of the Tax Injunction Act (28 U.S.C. § 1341) to the present proceeding. However, in a separate decision, which Jackson County did *not* seek to bring before this Court, the Eighth Circuit expressly and correctly held that Act by its own terms to be wholly inapplicable

Likewise unworthy of review is the question of the denial of the Clark and Jackson County motions to intervene as of right.[33] Judge Clark denied those motions because they were untimely[34] and because granting them "would unduly delay the implementation of the remedy to which the plaintiffs are entitled." App. 60a, 61a. The Eighth Circuit affirmed, finding no abuse of discretion in Judge Clark's denial. App. 44a-45a (citing *NAACP v. New York*, 413 U.S. 345, 366-67 (1973)).[35] That court furthermore found the denial harmless because the intervenors failed to show that their interest was not adequately represented by the State and because, in any event, they were permitted to participate in the proceed-

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to the orders entered in this case. *In re Jackson County, Mo.*, 834 F.2d 150 (8th Cir. 1987). Accordingly, even if Jackson County had standing to raise questions related to the merits of the Eighth Circuit's judgment in this case, it clearly cannot raise questions not presented below in this case. *See e.g., Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) (declining to consider "a claim that was not presented to the courts below").

[33] As the Eighth Circuit noted, Clark and Jackson County also sought permissive intervention, which was also denied, but that denial was not appealed. App. 42a n.22. It is therefore not before this Court.

[34] As Judge Clark noted, his order of July 6, 1987 announced his intention to levy a tax to produce the necessary funds; yet neither the Clark group of taxpayers nor Jackson County (responsible for collection of the tax) sought to intervene until *after* the court's September 15, 1987 Order had fully resolved the tax issue. App. 60a.

[35] The Eighth Circuit's denial of intervention was clearly in accord with the standards followed in the other circuits. *See, e.g., United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); *Garrity v. Gallen*, 697 F.2d 452, 457 (1st Cir. 1983) (motion by group of black parents untimely when filed four-and-one-half months after decree); *Delaware Valley Citizens' Council v. Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982) ("motion to intervene after entry of decree should be denied except in extraordinary circumstances"); *United States v. Louisiana*, 669 F.2d 314 (5th Cir. 1982); *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102 (6th Cir. 1981); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 837 (1978).

ings as *amici curiae* (both through briefing and at oral argument). App. 45a n.23.[36] In these circumstances, not only were the rulings below clearly correct, in accordance with settled law, well within the lower courts' discretion, and harmless error at worst, but they plainly raise no important issue meriting this Court's attention.

III. The Court Should Not Disturb the Ongoing Desegregation Process to Review Legal Principles Finally Resolved Against the State in Earlier Proceedings

In addition to the serious doubt concerning the Court's jurisdiction and the lack of an important legal question meriting the Court's attention, there is a final reason why the Court should decline to grant certiorari—the questions the State now asks the Court to review were *all* resolved against it in earlier proceedings, and in each of those proceedings certiorari was either sought and denied or was not sought at all. The Court should not permit the State to relitigate those questions now, not only because the lower courts and the parties relied upon the earlier resolution of those questions in devising the present remedial orders, but also because such relitigation would surely delay and destabilize the already-too-long-delayed desegregation of KCMSD.

The State's first assigned question—an attack on the key elements of the desegregation plan—was in substance decided against it on the first appeal in this case, *Jenkins I*. There, as here, the State's chief complaints were that the significant deterioration in the schools was not a vestige of segregation and that a program designed to induce voluntary transfers of non-minority students to

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[36] Again, the Eighth Circuit's ruling was in full accord with settled law in the other circuits. *See, e.g., Mumford Cove Ass'n Inc. v. Groton*, 786 F.2d 530, 535 (2d Cir. 1986) ("no basis to rule that the district court abused its discretion in denying permissive intervention, particularly when it afforded appellants *amici* status"); *Bush v. Viterna*, 740 F.2d 350, 358 n.1, 359 (5th Cir. 1984) (per curiam); *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889, 890 (6th Cir. 1978); *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977).

KCMSD schools was impermissible.[37] Both Judge Clark and the *en banc* Eighth Circuit rejected these complaints [38] and, although certiorari was sought by plaintiffs and KCMSD on the question of interdistrict relief, the State did not seek review of the Eighth Circuit's decision at all.[39] As a result, the capital-improvements and magnet-school plans now before this Court were implemented and are in the third year of a five-year program. The State has offered no reason why it should be permitted to attack the basic elements of that program on grounds it lost in *Jenkins I* (and did not petition to this Court) and thereby threaten the delicate progress that program is making.[40]

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[37] The State's other central complaint here is against the lower courts' use of the quality of education in the suburban schools as a guide to the level to which KCMSD must be restored to cure the unconstitutional segregation. However, as earlier described (pp. 16-18), in *Jenkins I* the State acknowledged the propriety of programs designed to achieve for KCMSD the AAA status already enjoyed by the suburban schools. It should not be heard to reject that proposition now.

[38] 807 F.2d at 683-84, 685; App. 185, 189a-90a.

[39] The State *did* seek review of similar issues in *Liddell*, and this Court denied certiorari. *Missouri v. Liddell*, 469 U.S. 816 (1984).

[40] In 1987-88, after years of steady decline, the KCMSD's non-minority student percentage at last showed a small increase. Moreover, some of the District's schools have experienced significant voluntary desegregative gains as they have converted to magnet schools. For example, Central Middle School, located in a heavily minority residential area, was virtually 100 percent black when the plan was implemented. With the establishment of a computer theme, it now has a non-minority student population of 20 percent. Faxon Elementary was only 4 percent non-minority in 1987-88; it opened as a Montessori school in the fall of 1988 at 39 percent non-minority. Pinkerton Elementary was only 2 percent non-minority in the fall of 1987. In the fall 1988, it opened as a Latin Grammar Magnet School, complete with a curriculum including Latin, uniforms, and a strict discipline code, and attracted a 40 percent non-minority student enrollment. This progress, at these schools and others, is all the more impressive considering that the capital improvements are still underway at many schools, necessarily causing some disruption and temporary relocation.

The State's second assigned question—its attack on the authority of the courts to assure funding of the desegregation plan through a tax increase if necessary—has been twice resolved against it prior to the present proceeding. Thus, in *United States v. Missouri, supra* (a case involving St. Louis area school districts), the *en banc* Eighth Circuit for the first time addressed the power of Missouri federal courts to require property tax increases to fund a desegregation plan. There, as here, the local school districts did not have sufficient funds to meet their constitutional obligation and there, as here, the district court ordered that the necessary property tax levy be put in place, notwithstanding contrary Missouri law. On appeal, the Eighth Circuit (relying on *Griffin* and *Swann*) affirmed the district court's authority to issue such an order, and in so doing, rejected the same claims the State makes here. *Missouri*, 515 F.2d at 1372. Certiorari was sought on the issue and denied by this Court. 423 U.S. 951 (1975).

Subsequently, in *Liddell*, the *en banc* Eighth Circuit again faced this same question and again relying on *Griffin*, *Swann*, and *North Carolina Bd.*, as well as on the Contract Clause cases, rejected the State's arguments which it repeats here. 731 F.2d at 1320-22. Significantly, the State—represented by the same counsel who represent it here—petitioned for certiorari, but *not* on that issue. However, the City of St. Louis did petition on that issue and, as in the previous *Missouri* case, this Court again denied certiorari. *Leggett v. Liddell*, 469 U.S. 816 (1984).

It is not our contention, of course, that this Court *may not* review matters that have become the law of the case or that have been repeatedly denied on certiorari. Rather, it is simply our contention that the Court *should not* review them where, as here, the Court's jurisdiction is in serious doubt, where the assigned questions are not fairly raised, where the matters that *are* fairly raised

are well-settled, where the State has had repeated opportunities to litigate those matters, and where affording the State yet another opportunity to litigate them could have a serious, disruptive effect on the ongoing desegregation process.[41] Given the long history of this case and the great care Judge Clark and the Eighth Circuit have given to the present remedial orders, only the most compelling showing would justify that disruption and the State has plainly not made it.

Indeed, it is submitted that to grant the State's petition and permit it to relitigate long-settled matters would be to condone and reward the continued resistance to the desegregation process the State has displayed throughout these proceedings. As Judge Clark remarked nearly three years ago during the remedial hearings:

> [T]he thing that concerns me is that 32 years have passed [since] May of 1954, and to my knowledge the State of Missouri has done nothing voluntarily, affirmatively, to carry out its constitutional duties . . . . [Transcript of Hearings on the Long-Range Magnet School Plan, September 19, 1986, at 1000 (Vol. V).]

It is time to permit the lower courts' carefully-developed remedial orders to proceed, unimpeded by further State efforts to resist paying for the harm of the segregation it mandated in its schools.

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[41] The key to the success of the plan ordered by Judge Clark will be the voluntary choices of parents to enroll their children in magnet schools. Those schools are designed to desegregate by drawing children out of their neighborhoods to schools offering educational themes that will extend through their school years. Accordingly, parents considering transfers to the magnet schools must be assured about the stability and continuity of the program if the necessary, voluntary desegregation is to occur. The State's unrelenting appeals of Judge Clark's orders (including five appeals now pending before the Eighth Circuit from eight separate district court orders) threaten that stability and continuity. A grant of certiorari by this Court would surely undermine it further.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

DAVID S. TATEL
ALLEN R. SNYDER *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6816

Counsel for Respondent
Kansas City, Missouri
School District

* Counsel of Record

March 17, 1989

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

January 3, 1989

John B. Williams, Esq.
2nd Floor, Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106

Re: Jackson County, Missouri, et al. v. Kalima Jenkins, etc., et al.

Dear Mr. Williams:

Your application for an extension of time within which to file a petition for writ of certiorari was received December 31, 1988 and is returned as out-of-time.

Please note that a petition for rehearing en banc does not toll the time for filing a petition for a writ of certiorari, only a petition for rehearing would toll the time. See Rule 40 of the Federal Rules of Appellate Procedure and Rule 20.4 of the Rules of the Supreme Court. Please note that Rule 35(c) of the Federal Rules of Appellate Procedure clearly states that the pendency of a petition for rehearing en banc shall not affect the finality of the judgment of the Court of Appeals. Accordingly, the time to file this petition for writ of certiorari began to run on August 19, 1988 when the judgment was announced.

Very truly yours,

JOSEPH F. SPANIOL, JR.
Clerk

By

FRANCIS J. LORSON
Chief Deputy Clerk

th
Enc.
cc: Clerk, USCA-8th Circuit (Your Nos. 86-1934, 2537, 87-1749, 2299, 2300, 2588)

Arthur A. Benson, II, Esq.
James S. Liebman, Esq.
Allen Snyder, Esq.
H. Bartow Farr, III, Esq.
Mark J. Bredemeier, Esq.
Thomas A. Hamill, Esq.
James J. Gilligan, Esq.
Daniel J. Popeo, Esq.
Thomas A. Micker, Esq.
Theodore Shaw, Esq.
Shirley W. Keeler, Esq.
Michael J. Fields, Esq.
Michael D. Gordon, Esq.
Dennis Owens, Esq.
David K. Flynn, Esq.
Peter Hendrickson, Esq.
Julius Chambers, Esq.
Hon. Robert T. Stephen

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

August 19, 1988

Hon. William Webster
Attorney General
Attn: Mr. Terry Allen
Deputy Attorney General
Mr. Michael Fields,
Asst. Attorney General
P. O. Box 899
Jefferson City, MO 65102-0899

Mr. H. Bartow Farr, III
Onek, Klein & Farr
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037

Re: 86-1934WM+ Kalima Jenkins, et al. v. State of Missouri

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion is also entered today.

Please review Federal Rules of Appellate Procedure 35 and 40 and Eighth Circuit Rules 15 and 16. Petitions for rehearing *must* be received by the Clerk's office within the time set by FRAP 40 (within 14 days of entry of judgment) unless extended by court order. Petitions for rehearing or motions to extend the time for filing rehearing requests are not afforded any grace period for mailing and are subject to being denied if not timely received. Please review Eighth Circuit Rule 16(d) if an en banc request is contemplated.

You are also directed to Federal Rule of Appellate Procedure 39 and Eighth Circuit Rules 7(f) and 8(j).

Itemized and verified bills of costs are to be filed with this office with proof of service within 14 days from this date. Counsel for the prevailing party should promptly forward to us an itemized bill of costs for the reproduction of the authorized number of copies of their briefs. Failure to submit an itemized bill of costs will result in waiver of costs. Untimely itemized bills of costs will not be processed without a special order of the Court. Objections to requested bills of costs must also be submitted on a timely basis—within 10 days of the bill of costs.

Sincerely,

ROBERT ST. VRAIN
Clerk

/s/ Michelle McCloud
By: MICHELLE MCCLOUD
Deputy Clerk

RStV/mlm
Enclosure
cc: All Counsel of Record
(See attached listing)

JOHN B. WILLIAMS
County Counselor
Jackson County Courthouse
415 E. 12th St., 2nd Floor
Kansas City, MO 64106-2704

THEODORE M. SHAW
NAACP Legal Defense Fund
Suite 800
634 South Spring
Los Angeles, CA 90014

ALLEN SNYDER
Hogan & Hartson
555 13th St., N.W.
Washington, D.C. 20004

MICHAEL D. GORDON
Jolley, Walsh, et al
204 W. Linwood Blvd.
Kansas City, MO 64111

ROBERT F. CONNOR, Clerk
U.S. District Court
201 U.S. Courthouse
811 Grand Ave.
Kansas City, MO 64106

THOMAS A. HAMILL
Perry & Hamill
P.O. Box 7933
Overland Park, KS 66207

JAMES J. GILLIGAN
1440 New York Ave., N.W.
Washington, D.C. 20005

PETER HENDRICKSON
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402

DENNIS J. C. OWENS
10th Floor, Riss Building
215 W. Pershing Rd.
Kansas City, MO 64108

JAMES S. LIEBMAN
Columbia Univ Sch of Law
435 W. 116th St.
New York, NY 10027

MICHAEL J. FIELDS
Asst. Atty. General
P.O. Box 899
Jefferson City, MO 65102

MARK J. BREDEMEIER
General Counsel
Landmark Legal Foundation
1006 Grand Ave., 15th Fl.
Kanusas City, MO 64106

MARY FAUERBACH
Court Reporter
7614 West 72nd Terrace
Overland Park, KS 66204

DANIEL J. POPEO &
PAUL D. KAMENAR
1705 N Street, NW
Washington, D.C. 20036

JULIUS CHAMBERS,
JAMES M. NABRIT, II, &
CHARLES S. RALSTON
99 Hudson St.
New York, NY 10013

ARTHUR A. BENSON
Suite 1430
911 Main St.
Kansas City, MO 64105

SHIRLEY W. KEELER
Blackwell Sanders et al
P.O. Box 419777
Kansas City, MO 64141

H. BARTOW FARR, II
Onek, Klein & Farr
Suite 350
2550 M St., N.W.
Washington, D.C. 20037

THOMAS A. MICKES
720 Olive, 24th Floor
St. Louis, MO 63101

DAVID K. FLYNN
Attorney
U.S. Dept. of Justice
Washington, D.C. 20530

HON. ROBERT T. STEPHEN
Kansas Judicial Center
2nd Floor, 301 W. 10th St.
Topeka, KS 66612-1507

RICHARD A. KING &
RONALD C. SPRADLEY
1410 Twelve Wyandotte Plaza
120 West 12th St.
Kansas City, MO 64105

Updated 3/18/88

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Aug. 25, 1986]

The Kansas City Missouri School District (KCMSD) has moved this Court for an order enjoining the rollback in the real estate tax levy otherwise required under Proposition C. (R.S. Mo. §§ 163.057 and 164.013).

Responses to the motion have been filed on behalf of the plaintiffs and the State of Missouri. Plaintiffs support the motion. The State urges that KCMSD be required to pay its share of desegregation costs; it takes no position as to the method through which KCMSD obtains the funds to meet its burden.

In previous memorandum opinions issued, this Court has set forth detailed findings of fact and reasoned statements of law regarding constitutional violations practiced by the State and the KCMSD as well as comprehensive plans in an effort to place the victims of the violations in substantially the position which they would have occupied had the violations not occurred. The Court will not repeat in this order in any detail previous findings

of fact and conclusions of law set forth in previous opinions.

The Court has found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number[s] of students leaving the schools of Kansas City and attending private schools and that it has caused a system wide reduction in student achievement in the schools of KCMSD. It has also found that by improving the quality of education in the KCMSD, it will enhance the appeal of the school system, thus giving it a chance to retain its present white enrollment and also encourage whites in private and suburban schools to enroll in its schools. As set forth in its order of June 14, 1985, the basic remedial principle in school desegregation cases, is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

As indicated in its order of June 14, 1985, this Court is aware that there are limitations on the remedial powers of a federal court to correct constitutional violations. While remedies in desegregation cases are drawn from the heart of equity, they should not be broader in scope than necessary to restore the victims of the violations to the position they would have occupied in the absence of such conduct.

Before issuing the remedial order of June 14, 1985 and the amendment thereto entered June 16, 1986, this Court was of the firm conclusion that the plans were not wider in scope than necessary to correct the constitutional violations and to restore the victims thereof to the positions which they would have occupied in the absence of such violation. The United States Supreme Court observed in *Watson* v. *Memphis*, 373 U.S. 526, 537, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963), "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

It was held in *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970) that the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971) held that state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

A federal court's authority to impose or raise taxes has been recognized by the United States Supreme Court in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964) and *Louisiana ex rel. Hubert* v. *Mayor and Council of New Orleans*, 215 U.S. 170, 30 S. Ct. 40, 54 L. Ed. 144 (1909) and by the Eighth Circuit Court of Appeals in *United States* v. *Missouri*, 515 F.2d 1365 (1975) and in *Liddell* v. *State of Missouri*, 731 F.2d 1294 (1984).

Judge Stephenson stated in *United States* v. *Missouri*:

> It is anomalous to suggest that the district court has the power to disestablish a dual school system and does not have the power to fashion an appropriate remedy.

515 F.2d at 1372.

The court in *Liddell* v. *State of Missouri*, 731 F.2d at 1320 stated:

> We hold that the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative.

The court then set forth some of the alternatives which should be pursued.

In the Court's order of June 16, 1986, it assessed the KCMSD's portion of the desegregation budget for the

fiscal year 1986-87 at $12,593,751.00. The KCMSD contends, and the Court so finds, that revenues available to it for the 1986-87 fiscal year are insufficient by $6,300,000 to meet its share of the desegregation budget. Unless it can obtain additional funds the only alternative it has is to make major reductions in services of its regular educational program. The Court is of the opinion that this would be in direct conflict with the goals sought to be obtained through the desegregation plan.

KCMSD has made eight attempts in the last seventeen years to obtain voter approval of an increase in the tax levy. The last two attempts were in February and August of 1986 which required only a majority vote for approval. Obviously it would be futile to submit a bond issue which would require a two-thirds majority for approval. KCMSD has made efforts to obtain funding from charitable and civic groups. It has also approached the city council in regard to an additional sales tax without success and was unsuccessful in obtaining any appreciable extra funds from the state legislature. The District has made a diligent effort, though unsuccessful, to obtain funding for its share of the desegregation budget for the present fiscal year. Thus it appears that the only alternative left for the KCMSD is to seek relief from the Court.

The Court has previously held that the State should pay the major cost of a desegregation plan but that the KCMSD, also a violator, should share in that cost.

The Court stated at page 43 of its June 14, 1985 order that it was reluctant to take any action to increase taxes. The Court is not insensitive to the fact that a majority of those patrons of KCMSD who chose to vote in February and August of 1986 were opposed to a tax levy increase. However a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitu-

tional discrimination still exists in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shirk its sworn duty to uphold the Constitution of the United States. Therefore, it is hereby

ORDERED that the motion of the KCMSD to enjoin the rollback in the real estate tax levy otherwise required under Proposition C is granted; and it is further

ORDERED that the tax levy rollback required by § 164.013, R.S. Mo. (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional Six Million Five Hundred Thousand Dollars ($6,500,000.00) to enable the KCMSD to meet its share of the desegregation plan for the current fiscal year.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: August 25, 1986